JD(ATL)—01—06
Columbus, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

JBM, INC. D/B/A BLUEGRASS SATELLITE		
and	**Cases**	**9–CA–41052**
		9–CA–41219
		9–CA–41370
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)		**9–CA–41491**
		9–CA–41559
		9–CA–41593
		9–CA–41706
		9–CA–41730
		9–CA–41807
		9–CA–41904

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Linda Finch, Esq., and ***John Duffy, Esq.***
for the General Counsel.
Joseph Cohen, Esq.,
for the Charging Party.
Michael J. Angelo, Esq.,
for the Respondent.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, **Administrative Law Judge**: This consolidated case was heard before me in Columbus, Ohio, on July 18, 19, 20, 21, 22, 25, 26 and 27, 2005, pursuant to a consolidated complaint issued by the Regional Director of Region 9 of the National Labor Relations Board ("the Board") on May 27, 2005, as later amended on June 23, 2005. The complaint alleges that JBM, Inc. d/b/a Bluegrass Satellite ("the Respondent" or "Bluegrass Satellite" or "JBM") violated Sections 8(a)(1), (3), (4) and (5) of the National Labor Relations Act ("the Act"). The complaint is based on charges brought by United Electrical Radio and Machine Workers of America (UE) ("the Charging Party" or "the Union"). The complaint is joined by the amended answer of the Respondent wherein it denies the commission of any violations of the Act and Respondent also raises several affirmative defenses to the complaint.

Upon consideration of the testimony of the witnesses, the exhibits admitted at the hearing and the positions of the parties as argued at the hearing and as set out in their briefs, I make the following:

Findings of Fact and Conclusions of Law

I. The Business of the Respondent

The complaint alleges, Respondent admits and I find that at all times material herein that Respondent is and has been a corporation with an office and place of business in Maysville, Kentucky and a branch located in Columbus, Ohio, the facility involved in this proceeding, where it has been engaged in the installation and service of DirecTV satellite systems, that during the past 12 months, Respondent in conducting its aforesaid operations, purchased and received at its Maysville, Kentucky facility goods valued in excess of $50,000 directly from suppliers located outside the commonwealth of Kentucky and that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The complaint alleges that at all material times, the following individuals held the position(s) set forth opposite their respective names and have been supervisors for Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

John Basil Mattingly – Co-Owner/President
Chryl Bullock – Corporate Operations Manager
David Wallingford – Co-Owner/Vice President/Treasurer
Richard C. Schneider – Director of Resources
Mike Nickell – Sales and Safety Director
David D. Kingery – Columbus Head Area Technician

In its answer Respondent admits only that John Basil Mattingly, Chryl Bullock, David Wallingford, Richard C. Schneider, and Mike Nickell are agents of the Respondent and denies that they are supervisors within the meaning of the Act and denies that David D. Kingery is a supervisor or agent of Respondent in that Kingery is a bargaining member by prior written agreement of the Union and approval of the Administrative Law Judge. I find based on the evidence produced at the hearing that all of the above individuals were at all times material herein supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

II. The Labor Organization

The complaint alleges, Respondent denied in its answer and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The record in this case supports the conclusion that the Union has been at all times material herein a labor organization within the meaning of the Act. The unit employees participated in the Union and some served on the Union's bargaining committee in bargaining with the Respondent. The Union represented the unit employees in attempting to obtain a collective-bargaining agreement with the Respondent. It made numerous requests for information in order to prepare for bargaining and engaged in collective-bargaining with the

Respondent in an attempt to reach an agreement. Respondent recognized the Union as the collective bargaining representative for the unit employees in the settlement agreement of Case No. 9-CA-40251, et al., on March 17, 2004. Respondent referred to the Union as a labor organization in unfair labor practices it filed against the Union. The Union has been found to be a labor organization in the following Board decisions. *Consolidated Diesel Co.*, 332 NLRB 1019 (2000); *Aluminum Casting and Engineering Co., Inc.*, 328 NLRB 8 (1999); *Marriott Mgmt Services, Inc.*, 318 NLRB 144 (1995).

III. The Appropriate Unit

The complaint alleges, Respondent admits and I find that at all times material herein the following employees of Respondent have constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All satellite technicians, including head area technician and clerk employed by Respondent at its Columbus, Ohio facility; but excluding all professional employees, guards and supervisors as defined in the Act.

IV The Alleged Unfair Labor Practices

At all times since March 17, 2004, and at all material times the Union has been the designated exclusive collective-bargaining representative of the Unit and has been recognized as the representative by Respondent. This recognition has been embodied in a Settlement Agreement approved on March 17, 2004, in Cases 9-CA-40251, et al. by an Administrative Law Judge of the Board.

In August 2002, the Respondent entered into a recognition agreement with Local 707 of the National Production Workers Union ("Local 707") and signed a collective-bargaining agreement with Local 707. The agreement covered the technicians employed by Respondent at its Columbus warehouse. In October 2003, Local 707 and the United Electrical Radio and Machine Workers of America (UE) ("Charging Party" or "the Union") entered into a settlement agreement in Cases 9-CB-10922 and 9-CB-10938, in which Local 707 agreed not to effectuate the collective-bargaining agreement insofar as it applied to the Columbus, Ohio employees. Subsequently on March 17, 2004, Respondent entered into an informal settlement agreement with the Union in Cases 9-CA-40251, et al. which was approved by the Administrative Law Judge ("ALJ"). The settlement included Respondent's agreement to take remedial action to remedy numerous unfair labor practices. Under the terms of the settlement, Respondent agreed to recognize the Union as the collective-bargaining representative of its employees in Columbus.

On June 8, 2004, Respondent filed a motion with the ALJ to set aside the settlement agreement on the ground that it had a ". . . clear and unequivocal 'question concerning representation' (QCR) of the UE." In support of its motion Richard C. Schneider, Respondent's Director of Resources, asserted that none of the Columbus employees were dues paying members and that the Union had breached the agreement by employing employee Chad Jes a union bargaining committee member, after Respondent had paid Jes backpay in return for his waiver of employment in accordance with the settlement agreement. The ALJ

denied Respondent's Motion To Set Aside the Settlement Agreement by his Order of July 23, 2004. On April 6, 2005, Respondent filed a second motion to set aside the settlement agreement contending that both the Union and Region 9 of the NLRB had breached the settlement agreement by their contention that Head Area Technician David Kingery was a supervisor and that Region 9 was by this bias aiding and assisting the Union in breaching the settlement agreement. Respondent asserted and also maintained that a "genuine QCR" (Question concerning representation) existed. By his Order of May 13, 2005, the ALJ denied Respondent's second motion to set aside the settlement agreement.

On December 10, 2003, Respondent filed and subsequently maintained a lawsuit in the United States District Court for the Southern District of Ohio, Eastern Division against Local 707 requesting a Judgment and Order that the collective-bargaining agreement between Respondent and Local 707 be declared valid and enforceable. On May 16, 2005, Respondent filed a "Response" with the District Court asserting that a "valid and enforceable agreement existed between Respondent and Local 707." At all times material herein, Respondent has maintained this action seeking the nullification of its recognition of the Charging Party Union.

Decertification petitions were filed in June 2004 and in January 2005. Both petitions were dismissed by the Regional Director and Respondent appealed both rulings.

In its answer to the alleged commission of the unfair labor practices in the complaint the Respondent entered a denial and also raised the following Affirmative Defenses:

Respondent's Affirmative Defenses

Paragraph 20 – The Complaint fails to join parties indispensable to this action.
Paragraph 21 – The Complainant fails to join parties indispensable to this action.
Paragraph 22 – The allegations set forth in the consolidated complaints are outside any applicable statute of limitations.
Paragraph 23 – The Complainant's allegations, as set forth in the consolidated complaints, are time barred by the doctrine of laches as evidenced by the unilateral and intentional delays imposed by the National Labor Relations Board.
Paragraph 24 – The Respondent has, at all relevant times herein, maintained the status quo with respect to the wages, hours, and other terms and conditions of employment of employees referenced in the instant matters.
Paragraph 25 – The conduct of a non-agent/non supervisory bargaining unit member cannot as a matter of law, be imputed to the employer.
Paragraph 26 – The conduct of non-agent/non-supervisory bargaining unit members cannot, when acting in concert with another bargaining unit member, as a matter of law be imputed to the employer.
Paragraph 27 – The United Electrical, Radio and Machine Workers of America has no standing to bring the instant charges, in that, by their own admission, they have no members in the referenced Columbus, Ohio facility of JBM d /b/a Bluegrass Satellite.
Paragraph 28 – The Complainant, National Labor Relations Board, has exceeded its authority, without legal declaration of an inappropriate bargaining unit, by fragmenting a bargaining unit historically recognized by the parties as appropriate.

Paragraph 29 – The complainant, National Labor Relations Board, has throughout the investigation of this, and prior matters, consistently maintained a bias against the Respondent, as evidenced by the findings against the Respondent and the concurrent lack of legitimate and good faith investigation of charges filed by the Respondent.

Respondent asserted at the hearing in its motion to dismiss that many of the allegations in the consolidated complaint are untimely as the underlying charges were not filed within the Section 10(b) statute of limitations and that they are barred by the doctrine of laches. It is well settled that the equitable doctrine of laches does not apply in unfair labor practice proceedings. *Mid-State Ready Mix* 316 NLRB 500, 500-501 (1995), citing *NLRB v. Rutter Rex Mfg. Co.*, 396 U.S. 258, 264, 90 S.Ct. 417, 420-421 (1969).

Respondent moved to dismiss Paragraphs 5(a), (c), (d), (e), 6(a), (e)(2), (f), (g), (h), (i),10(a), 12(b)-(i), (k), (p) and 16(c) and (d) because they were not contained in charges filed against Respondent. I find however, that the charges filed in these cases from April 21, 2004 to May 19, 2005 address and concern the ongoing unlawful campaign of the Respondent to rid itself of its obligations to bargain with the Union by decimating the unit employees' support for the Union through the commission of a multitude of unfair labor practices. These allegations are all closely related as "all occurred within the same general time period and concern conduct which constitutes an unlawful plan to resist the Union." *Well-Bred Loaf*, 303 NLRB 1016 fn. 1 (1991); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 5 (1989); *Office Depot, Inc.*, 330 NLRB 640 (2000); Red-I, Inc., 290 NLRB 1115, 1116 (1988).

There is no merit to the Respondent's defense based on the 10(b) section of the Act as the 10(b) six month period does not commence to run until the Union has actual or constructive notice of the violation. *Concourse Nursing Home*, 328 NLRB 692. 694 (1999). The Respondent has not met its burden of proof to demonstrate that the Union had notice of the alleged unfair labor practices at the time they occurred. It is important to note that Respondent engaged in actively concealing many of its unlawful actions and rebuffed the Union's requests for information. In some cases the Respondent notified the employees directly of unilateral changes in their terms and conditions of employment and by-passed the Union.

I further find that Respondent maintained an unlawful rule prohibiting employees from discussing their wages under threat of discipline including termination. Accordingly the maintenance of this rule is an ongoing violation and complaint allegations based on this rule are not subject to dismissal based on a Section 10(b) defense. *Control Services*, 305 NLRB 435 fn. 2, 442 (1991).

I further reject Respondent's contention that the Union had no standing to file a charge on behalf of employee Kevin Rhodes as it did, because Rhodes was not an employee under the Act. A charge may be filed by a labor organization as well as by an employee, employer or any other entity or by any person. *Apex Investigation & Security Co.*, 302 NLRB 815, 818 (1991).

As set out above, after agreeing to recognize the United Electrical, Radio and Machine Workers of America (UE), (the Union) Respondent maintained a lawsuit in the United States

District Court for the Southern District of Ohio, Eastern Division, challenging the recognition of the Union as the collective-bargaining representative of the technicians in the bargaining unit at the Respondent's Columbus, Ohio warehouse. It also embarked on an illegal campaign to rid itself of the Union. As part of this campaign, it engaged in a series of attempts to solicit employee support to decertify the Union. In so doing Respondent committed a series of violations of Section 8(a)(1) of the Act by interrogation, and other violations. It also violated Sections 8(a)(3) and (4) of the Act by its discharge of employee Alisha Romans and the discharge and/or refusal to hire employee Kevin Rhodes because of their support of the UE Union and because of the testimony of Romans at a National Labor Relations Board hearing to which she was accompanied by Rhodes. It also violated Sections 8(a)(3), (5) and (1) of the Act by the removal of work from bargaining unit employees and the assignment of the work to private contractors and members of the Local 707 bargaining unit. It also violated Section 8(a)(5) and (1) of the Act through its agent Richard Schneider by refusing to furnish in a timely manner information necessary for UE to engage in collective bargaining and to represent its bargaining unit members. It also engaged in bad faith and surface bargaining by engaging in dilatory conduct and the offering of regressive proposals designed to frustrate bargaining and an agreement. It also made numerous unilateral changes to the wages and hours and terms and conditions of employment of the bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act.

Many of the allegations in the complaint involve the conduct of Head Area Technician (HAT) David Kingery who I find was at all times material herein a supervisor under Section 2(11) of the Act and an agent of Respondent under Section 2(13) of the Act. The evidence is overwhelming that Kingery was a supervisor and an agent of Respondent when he engaged in the unfair labor practices found infra in this decision. Kingery had the authority to hire and fire employees and to otherwise discipline them verbally and in writing. He also promoted employees. He met and interviewed applicants for hire and hired them without the necessity of obtaining permission from upper management. He was the highest ranking employee at the Columbus warehouse and was the only supervisor at the warehouse for all of the 25-50 employees who worked out of the warehouse during the 2004 to 2005 period in question. Moreover there was testimony from several employees whom I credit that Kingery conducted meetings wherein he informed them of Respondent's rules, regulations and changes in working conditions, pay, hours and policies and that they considered him to be their supervisor. *Ideal Elevator Corp.*, 295 NLRB 347, 352 (1989); *NLRB v. Yeshiva University*, 445 U.S. 670 (1980); *W. Horace Williams Co.*, 130 NLRB 223 (1961). I reject the contention of Respondent that it is not liable for Kingery's conduct as the HAT position is included in the description of the bargaining unit. *Ideal Elevator, supra*. I further find that Kingery had apparent authority to act on behalf of the Respondent, as an agent as well as a supervisor as evidenced by the various incidents wherein Kingery committed unfair labor practices on behalf of the Respondent's illegal campaign to rid itself of the UE Union. *Facchina Construction Co.*, 343 NLRB No. 98 (2004).

Respondent, by David D. Kingery, committed the following violations of the Act:

The evidence supports a finding that about March 19, 2004, Respondent's Head Area Tech David D. Kingery informed employees that supporting the Union was futile by telling

them that Respondent would never agree to a contract with the Union. This occurred two days after Respondent entered into the settlement agreement of the unfair labor practice case and by which agreement Respondent agreed to recognize the Union on behalf of the bargaining unit employees.

Employee Alisha Romans testified that on the Friday following her testimony on March 16, 2004, in the unfair labor practice case against the Respondent, she attended a tech meeting in the Columbus warehouse conducted by Kingery. Also in attendance at that meeting were tech employees Jim Bossard, Josh Rhodes, Tony Dutton, Nick Morava and Kevin Rhodes. Kingery told the employees at the meeting that he was no longer part of the Union and that therefore there would be no health and life insurance. Kingery also said that "if anybody had stabbed him in the back during this whole thing, don't expect to get any equipment ran out to them." Kingery also said "there wasn't going to be a contract settlement. That Chad (Jes) had taken his settlement and ran."

Employee Kevin Rhodes testified that he attended the tech meeting after the previous NLRB (hearing) which was a heated meeting. After the meeting Kingery was upset and Rhodes told him not to take it personally as it was just that the employees wanted some representation to make sure everything was fair. Kingery then said that all the employees' efforts were futile because Respondent was "not going to settle. They're not going to agree to a contract but less than what we had before. Now we're out our life insurance."

Tech employee Richard Hays testified that he had several conversations with Kingery after the settlement of the prior unfair labor practice case and that in these conversations Kingery told him "there was no way that they (the Union) would get the contract." "That there's no way that they're (Respondent) going to offer them, them being the UE (the Union) anything matching or better than the 707." "It's not likely that they (the Union) would get a contract."

Working Tech leader employee James Girton testified that on a morning in the summer of 2004, he heard Kingery say in passing conversation, "that Bluegrass was never going to sign a contract with them (the Union)."

Tech employee William Bright testified that in November of 2004, Kingery would occasionally, "state that there's no way that they're (the Respondent) going to sign a contract." Kingery also made this statement, "…a few times after, the first part of this year (2005)."

Tech employee Brian Hahn testified that Kingery had said in tech meetings held in 2004, that "there was no way that we would have a contract by the UE and there would not be anything signed and that was the sole purpose of having their insurance reinstated by 707 Union."

Tech employee Michael Meddings testified that on an occasion in January 2005, he asked Kingery in the presence of approximately 15 employees, "how negotiations were going. Dave Kingery promptly told us that the Company would never sign an agreement with the Union."

Tech employee John Rostofer testified that at a tech meeting held in either December 2004 or January 2005, in the presence of about 10 to 15 employees, Kingery told the employees that a contract "would never happen because Bluegrass and the Union would never come to terms because the Union wanted more benefits for us workers and more pay and all ….". Kingery said, "Bluegrass wouldn't go for it because its not fair to pay one area more…than the rest of the areas (those area employees represented by Local 707)."

Tech employee Tony Dutton testified that he attended tech meetings and at a meeting two months before he was terminated in March of 2005, the employees asked how negotiations were going. Kingery "told us that basically they were at a stalemate and that Dick Schneider wasn't going to give in to any of the Union's demands."

I credit the above testimony by these unit employees which was unrebutted and was conceded by Kingery who testified he was giving his opinion. Kingery testified that he did tell employees that selection of the Union was futile as the Respondent would never agree to a contract with the Union. Kingery also testified that no supervisor or manager had ever told him this and that this was his personal opinion. As found *supra*, I find that Kingery was a supervisor and agent of Respondent and that these statements were attributable to Respondent. I find that Kingery's statements were threats of futility of the employees support of the Union and that Respondent violated Section 8(a)(1) of the Act thereby. *Wellstream Corp.,313 NLRB 698, 706 (1994);* Outboard Marine Corp., 307 NLRB 1333, 1335 (1992), enfd. 9F.2d 113 (7th Cir. 1993); *Airtex*, 308 NLRB 1135, fn. 2 (1992).

The complaint alleges that about March 22, 2004, at Respondent's Columbus, Ohio facility, Kingery told employees that they could not talk about the Union on company property or on company time

Romans testified that on March 19, 2004, after the Board hearing, Kingery said the Union "could not be discussed on company property, company time. It needed to be done offsite." Employee Nick Morava testified he was a union steward and participated in negotiations as a part of the Union's bargaining team. There was a tech meeting at the warehouse soon after the settlement agreement recognizing the Union was signed. The meeting was led by Kingery who told the employees that a settlement had been reached, and that Chad Jes was no longer working there. Kingery then said "that we couldn't talk about the Union on company property or time, or wear union buttons." Employee Girton testified that in a morning meeting in the summer of 2004, the employees "were told, by Dave Kingery, to conduct no Union business on Company property or time." Girton testified on cross-examination that there was no discussion of the progress of negotiations during the tech meetings. "Not at the tech meetings, no. It was pretty much not allowed. You don't talk about it and it didn't get brought up. We didn't talk about it." Employee Meddings testified that employees were not allowed to discuss the Union on Company property. "I'd asked at one point, if we could have union meetings at the warehouse so that everyone could be present and it would [be] convenient and Dave Kingery told us that we were not allowed to discuss Union business on Company property." Girton also testified that there were no other topics that employees were not allowed to discuss on Company property. Bright testified that occasionally at the tech meetings, a gentleman named "Brian" would be asked by Kingery to

give an update of the Union negotiations. However, "Eventually it got to the point that Dave Kingery said that you're not allowed to talk about Union negotiations on Company property." Bright testified further that whenever Kingery got into an argument with an employee concerning their job and the employee said he would have to talk to his union, Kingery would say, "if you want to talk about Union business, take it off the property." Employee Hahn testified that Kingery informed the employees that they were not allowed to talk about any union activity in the Columbus facility but only outside of the facility. Employee Hays testified that after the settlement agreement was posted, Kingery told the employees that they were not to discuss any union business on the Company grounds.

I credit the foregoing unrebutted testimony of the unit employees and I find that Respondent violated Section 8(a)(1) of the Act by Kingery's various statements to the employees that they were not allowed to discuss the Union on Company time or property. *Teskid Aluminum Foundry*, 311 NLRB 711, 714 (1993).

> The complaint alleges that on several occasions from about July 2004 to about November 2004, at Respondent's Columbus, Ohio facility, Kingery threatened an employee that Respondent would subcontract work in order to reduce the size of the bargaining unit and get rid of the Union

Scott Myers, a technician who was promoted to QC Technician and later to a tech trainer testified that when he became a trainer about three or four months before he quit in November 2004, there was an increase in the use of contractors. He talked to Kingery about it and Kingery, "said that we had to get the UE (the Union) out. The only way to do that was to drop the number of employees down to 20. And the UE (the Union) wouldn't have power and the Company would have power again." Kingery told him he had received this instruction from Schneider. Kingery told Myers and the WTL's (Working Tech Leaders) that they would be taken care of. Kingery, also told Myers that Schneider and (Regional Manger) Mike Nickell were going to fake interviews and were going to assign any applicants that looked good, to Lonnie, an outside contractor who had recently come in and they were going to man up Lonnie who was going to pick "up the work, meaning priority installs that got taken away from us. All we got was service calls and upgrades." During this period of time when Respondent was using new contractors it did not hire any new techs. During this time Kingery told him that Snyder would be opening up a secret warehouse for subcontractors and the employees at the Columbus location would not know anything about it.

Employee Hays testified that Kingery told him that the use of subcontractors was, "going to be used as a tool to get rid of people that were causing problems…if they had any sort of problems with someone, it was easier to…not give them a job and they'd…have to find something else to do." Kingery also told Hays that contractors were being assigned to the northern counties in its service area and the employees who lived in the northern counties would have to drive south or lose their jobs. In answer to questioning concerning this allegation as to whether he told employees that Respondent was subcontracting to cause the employees to quit, Kingery gave an equivocal answer "I don't believe so."

I credit the testimony of the witnesses called by General Counsel in support of this allegation. I found their testimony convincing and corroborative that the Respondent told

employees that subcontractors were being used to deplete the size of the bargaining unit in order to get rid of the Union. I find these were unlawful threats in violation of Section 8(a)(1) of the Act. *MPG Transport Ltd*, 315 NLRB 489, 492 (1994).

On several occasions from about July, 2004, to about November, 2004, Kingery, at Respondent's Columbus, Ohio facility, solicited an employee to denigrate the Union to other employees and encourage them to decertify the Union

Scott Myers, a former warehouse employee testified he worked for Respondent for a period of about 18 months, initially as a technician but was subsequently promoted by Kingery to a technician and later to a tech trainer, where he did interviews of prospective employees and coordinated drug testing and paper work. He did the training to bring the techs up to the job specifications standards. After he interviewed the prospective employees he would put a star on ones that looked good and give them to Kingery for his review and set the others aside. Myers testified that Kingery told him and some other employees, "to go around the parking lots and kind of discourage the UE and…tell the employees that…the 707 was the best thing for them."

I credit the unrebutted testimony of Myers and find that supervisor Kingery did in fact solicit Myers and other employees to disparage the UE Union and to support the 707 Local Union and that Respondent violated Section 8(a)(1) of the Act thereby. *Albert Einstein Medical Ctr.*, 316 NLRB 1040 (1995); *Horizons Hotel Corp.*, 312 NLRB 1212 (1993). As General Counsel points out in brief, Kingery put Myers in the position of causing him to reveal his own sympathies of the Union thereby engaging in unlawful interrogation. *Gardner Engineering*, 313 NLRB 755 (1994)

Kingery told an employee that Respondent was subcontracting work to cause bargaining unit employees to quit

Richard Hays testified he started work for Respondent as a contractor in November 2002 and subsequently became an employee when Respondent told contractors to sign union authorization cards for Local 707 and they would become employees. He was initially employed as a technician. He later became a working team leader and assisted technicians in completing their daily routes, kept extra inventory for them and checked in the technicians. He quit his employment in April or May 2005. Hays testified that although Respondent had always had some contractors, Respondent began to increase the number of contractors and assign work to the contractors which had been previously performed by its employees. This consequently decreased the work assigned to the Respondent's employees in the fall of 2004. He told Kingery he was worried about the loss of the work for himself and other employees. Kingery told him in one of several telephone conversations that this transfer of work to the contractors from the bargaining unit employees was to be used as a tool "to get rid of people that were causing problems…" I credit the specific testimony of Hays over the equivocal answer "I don't believe so" of Kingery at the hearing when he was asked whether he told employees that Respondent was subcontracting work to cause employees to quit. I find the evidence in this case supports a finding that these actions were taken to reduce the bargaining unit by transferring the employees' work to contractors. I thus find that Respondent violated

Section 8(a)(1) of the Act by this statement made to Hays by Kingery. *MGP Transport Ltd*., 315 NLRB 489 (1994).

On several occasions between March 2004 and March 2005 Kingery solicited employees to sign a prepared document to decertify the Union

Kingery admitted at the hearing that he participated in getting employees to sign a petition to get the Union out and asked other employees to sign and that he signed the petition. On about November 20, 2004, he solicited other employees to sign a document prepared by Richard Hays to get rid of the Union. Kingery's testimony in this regard was corroborated by several employee witnesses at the hearing and no rebuttal was offered to the contrary. Rather Respondent relies on its defense that Kingery was not a supervisor or agent of Respondent under the Act. As noted supra I have rejected this defense and have found that Kingery has been at all times material herein a supervisor and agent of Respondent under the Act. I find that Respondent violated Section 8(a)(1) of the Act by its sponsorship and participation in the decertification petition. *V&S Pro Galv, Inc. v NLRB*, 168 F.3d 279 (6th Cir. 1999); *NLRB v. Allens I.G.A. Foodliner*, 651 F.2d 438 (6th Cir. 1981); *Rose Printing Co., 289 NLRB 252, 271 (1988).*

Conduct by Richard C. Schneider commencing about March 2004,on several occasions, by telephone solicited an employee to obtain signed statements from other employees repudiating the Union

Former employee and lead person Richard Hays testified at length and in great detail concerning the conduct of Richard Schneider in initiating the filing of two decertification petitions. Hays had been a supporter of Respondent during the Union's organizational campaign and reported to Kingery the progress of the UE's campaign, once even calling Kingery on a cell phone from a rest room during a Union meeting. Hays also reported to Schneider and even forwarded a memo from a union representative that he had received from a Union member, to keep Schneider apprised of the progress of the Union's campaign. Hays testified that after the settlement agreement was reached, Schneider initiated many conversations with him in which Schneider told Hays, he should obtain signed petitions to get the Union decertified. Hays did as he was told and he and Kingery obtained the signed petitions. Schneider gave him a fax number to send the petitions to the Board. Hays did as he was told and sent the petitions to the Board along with a letter which Schneider had dictated and which was printed by Warehouse Clerk Ann Shaw. The Regional Director denied the petition for an election. Hays testified that on June 23, 2004, he met with Schneider for breakfast across the street from Lane Aviation airport where Schneider kept his private plane on his trips to Columbus. At that meeting Schneider gave him directions and the signed documents and the decertification petition to be turned into the Board office in Cincinnati and told him to obtain time stamped copies.

Hays testified in detail concerning what occurred at the meeting such as that they had two plates of food as it was a buffet and that Schneider jokingly referred to the waitress as his daughter. Hays also testified that during the breakfast Schneider told him he was meeting there at the hotel later in the day with the Union and that the Union was not going to get a contract. Schneider also told him that if the Union made an offer, he would offer less as there

was a year to negotiate. Hays went to Cincinnati and filed the petition and then called Schneider to apprise him of this. Schneider told him he would need to get new cards signed to accompany the petition. Hays and Kingery obtained the signatures on petitions. When Hays later, again went to the Board in Cincinnati and attempted to file another petition, a Board agent told him that the petition would be dismissed because unfair labor practice charges had been filed. He accordingly did not file another petition at that time. During this period, Hays and Schneider talked frequently and Schneider would ask Hays if he had the "numbers" to win in a vote and Hays told him they did as he "was pretty sure I could talk people into signing." At Schneider's direction, Hays made a third trip to the Board and filed a second decertification petition.

I credit the detailed and straight forward testimony of Hays as set out above rather than the carefully worded denials of Schneider wherein he testified that he had not personally solicited any employees to sign the decertification Petitions. This denial was apparently based on Schneider's position that he, himself, did not solicit any employees to sign the decertification petitions. However, I find it is obvious that Schneider utilized Hays and Kingery to do the soliciting. I reject Respondent's position that Schneider merely gave Hays ministerial assistance in decertifying the Union. It is apparent that Schneider was the moving force in Respondent's campaign to rid itself of the Union. I accordingly find that Respondent by its Human Resources Director and Agent Schneider and by its Head Area Technician Kingery violated Section 8(a)(1) of the Act by instigating and soliciting employees to file and sign decertification petitions with the Board. *Montag Oil Inc.*, 271 NLRB 665 (1984); *Pro Galv Inc., supra*.

Threat to employee Nick Morava

As will be discussed elsewhere in this decision the Union had made a number of requests for information which had not been answered or timely fulfilled by Respondent. One of these requests for information was for the names, addresses, telephone and fax numbers of bargaining unit employees. Employee Nick Morava was a bargaining unit member of the negotiating committee and was a participant in the bargaining sessions. Painter testified that on November 17, 2004, during a bargaining session he received from Respondent a document containing the names and telephone numbers of bargaining unit members but not the addresses he had requested. On November 24, 2004, Painter called a caucus during a bargaining meeting and during the caucus he noticed a document lying by the door. He read it and saw it contained the names, addresses and telephone numbers he had requested. Painter testified he believed it had been slipped under the door by Schneider. However, later at a meeting in December, Schneider accused Painter of stealing the document. When Painter attempted to explain to Schneider how he had obtained the document, Schneider became irate. Schneider then pointed his finger at bargaining unit and committee member Morava and told him that if he knew where the document was, his job could be in jeopardy. Schneider conceded at the hearing in this case that he had said that Morava's job might be in jeopardy. Schneider then filed a complaint with the airport police. Painter objected to the allegation that the Union had stolen the document but subsequently returned the document to Schneider.

I find that Respondent violated Section 8(a)(1) of the Act by the issuance of the threat by Schneider to Morava. It is clear that Morava was engaging in protected concerted activity

while serving as a member of the bargaining committee and was singled out by Schneider because of his membership on the bargaining committee with the obvious coercion that this threat was to Morava's employment. There was no evidence that Morava had engaged in any misconduct so as to lose the protection of the Act.

The rule prohibiting the employees' discussion of wages

It is admitted by Respondent that at all times material herein, it maintained the following rule in its policy manual:

> [Respondent] also encourages each employee to keep their wages confidential, not to be discussed with co-workers. [Respondent pays each employee individually based upon individual performance, productivity and responsibility and in accordance with the Local 707 contract]. If you have a concern with your wages, please discuss this with your supervisor, not with co-workers or other individuals.

Respondent's policy manual provides that violations of any company rule can result in disciplinary action up to and including termination.

I find that the maintenance of the above stated rule prohibiting employees from discussing their wages with co-workers under threat of discharge is violative of Section 8(a)(1) of the Act as it interferes with the employees' exercise of their Section 7 rights. *Hecks Inc.*, 293 NLRB 1111, 1119 (1989); *W. R. Grace Company*, 240 NLRB 813, 816 (1979).

Actions against employees Alisha Romans and Kevin Rhodes

In March 2003, Kevin Rhodes, accompanied by his fiancé Alisha Romans filled out an application and applied for a job as a satellite technician with Respondent. He was interviewed by Head Area Technician ("HAT") David Kingery. At that time his driver's license was under suspension and he would therefore be unable to drive a motor vehicle until the suspension was removed. Kingery suggested that Romans apply as well so that she could drive and she and Rhodes could work as partners. Romans advised Kingery that she was afraid of heights and could not climb ladders as was required to attach the wires and connections for the cable service to customers' homes and property. She also told Kingery she could not be confined to close areas to go through crawl spaces and other confined areas. Kingery recommended that Romans do the driving and paperwork and inside work while Rhodes climbed the ladders and worked in the confined spaces as required. They agreed that Romans would become an employee and that she and Rhodes would work as a team and that Rhodes would not be hired until his driver's license was reinstated. Kingery assigned satellite technician Nick Morava to train Romans and Rhodes with Romans doing the driving, the inside work and the paperwork and Rhodes doing the climbing and outside work and work in confined crawl-spaces. Morava reported to Kingery that Romans and Rhodes worked well together and Kingery nodded his head affirmatively in approval. Consequently Romans and Rhodes worked for over a year in this arrangement with Romans being employed as a satellite tech employee and Rhodes unofficially performing the above work in partnership with

Romans. Both Romans and Rhodes signed union authorization cards for the Union and Rhodes solicited union cards for the Union. Rhodes attended tech meetings weekly and even spoke up in some meetings in support of the Union. At the hearing Kingery admitted that he was aware that Rhodes rode with Romans but denied there was any arrangement for Rhodes to work in partnership with Romans and the money she received to be for both of their labors on behalf of Respondent.

On March 16, 2004, Romans was called to testify in an unfair labor practice case filed against the Respondent. She testified in that case that she had attended a meeting held by Respondent where she and other employees had been threatened by Schneider that they would lose their jobs unless they signed union authorization cards on behalf of Local 707. Rhodes was not called to testify but accompanied Romans to the hearing. Romans and Rhodes did not receive any work assignments for two days after this on March 17 and 18th, and Romans testified she was told by the office that it was because Respondent did not know when she would be returning from the hearing. On about March 19, 2004, at an employee meeting Kingery was agitated at the employees and used profanity. He also stated that if anyone stabbed him in the back during the unfair labor practice proceedings that they should not expect him to be nice to them or deliver needed equipment to them or help them out by reassigning jobs. Romans testified that on March 17th and 18th or 19th, they were assigned to an undesirable route. On the next work day March 22nd, Rhodes was scheduled to take a drug test following his 4th application for employment, two of which Respondent claimed were lost. Rhodes' driver license had been reinstated. Rhodes received a telephone call from Kingery at home that morning who told Rhodes to come into the warehouse as they needed to talk prior to Rhodes taking the drug test. When Rhodes and Romans arrived at the warehouse, Rhodes was told by Kingery that he could not hire Rhodes because he lived outside the DMA (Direct Management Area). This was a new requirement that had only been made effective that morning and involved areas where satellite providers were designated to provide service. It is significant that Kingery and former employee Phillip Macio also lived outside the DMA but there was no evidence that they were affected by this change. Rhodes became upset as he had been working in the unofficial role as a member of the team with Romans for over a year and had filed four applications, three of which were filed after the expiration of the driver's suspension. Kingery also told Romans and Rhodes at that time that they could no longer work together. He did not offer to assign another partner to work with Romans. Romans became upset and told Kingery that she believed she was being bullied out of her job as Kingery had known and had even suggested that she and Rhodes work together because she could not climb ladders and get into confined areas such as crawl spaces. She and Rhodes went out and performed a job Romans was assigned to that day. After the completion of the job, Romans called the dispatching office for a follow up customer service interview by Respondent of the customer regarding their satisfaction with the installation. While the customer was on the phone Romans noted that the customer stated that two individuals had come to the home to perform the service. Romans then contacted dispatch and asked when this question had been added to the interview and was informed by dispatch that it had been added that morning. During this call the dispatcher also put Kingery on the phone. Kingery told Romans that he had told her that she must handle the calls by herself. She told Kingery he knew she could not perform the jobs by herself. She concluded the call and later called Chryl Bullock, Corporate Operations Manager, who said he was unaware of what was going on and would check with Kingery, but he did tell her that Rhodes could not

be hired because he did not live in the DMA. She also told Bullock that she believed she was being bullied out of the job because she had testified at the National Labor Relations Board hearing on March 16th. Subsequently Romans resigned because of her inability to perform the work without a partner. There was ample evidence that at least ten other employees had been permitted to work as partners, including two husband and wife teams, one former contractor who was hired along with his girl friend, two brothers and employee Matthew Bitler who was permitted to work with Satellite Tech Hays as a team because Bitler's driving license was suspended and he could not drive. Ultimately Romans resigned because of her denial of a partner and signed a resignation letter that had been prepared by Schneider after which Schneider hired Rhodes as a contractor for Dish Network.

I find that General Counsel has established a prima facie case that Romans was constructive discharged by Respondent because of her perceived support for the Union and her testimony at the Board hearing. The record in this case overwhelmingly establishes the animus of the Respondent toward the Union by virtual of the numerous violations of Sections 8(a)(1) and (5) committed by the Respondent including the issuance of unlawful threats, and of refusals and delays in furnishing information to the Union which was necessary to bargain and the implementation of unilateral changes. The timing of the actions taken against Rhodes and Romans in less than a week after Romans testified at the National Labor Relations Board hearing in Cases 9-CA-40251, 9-CA-40250, 9-CA-40292, 9-CA-40334, 9-CA-40377, 9-CA-40460, 9-CA-40577, and 9-CA-40600, concerning a meeting where Schneider issued new employee handbooks and distributed Local 707 union cards is significant in establishing the motivation of the Respondent for its retaliation against Romans and Rhodes by refusing to employ Rhodes after he had been unofficially performing the job for over a year. It is undisputed that Rhodes and Romans had successfully performed their jobs for this period.

I find the purported reason for not hiring Rhodes because he did not live in the DMA (Direct Management Area) was a pretext. I reject Respondent's defense that it could not hire Rhodes because of Respondent's insurance carriers' restrictions on coverage of employees who had been suspended in the last three years. This argument was clearly an afterthought. The record reflects that employee Matthew Bitler was permitted to work with another employee as a partner because Bitler's license had been suspended.

With respect to the constructive discharge of Romans, I find that General Counsels have established a prima facie case that Respondent violated Sections 8(a)(1), (3) and (4) of the Act by its refusal to hire Rhodes and/or to continue to permit him to work as her partner and or its failure to assign Romans another partner. I find that this action by the Respondent imposed an intentional onerous burden on Romans which was motivated by its animus toward the Union. I find that the burden imposed on Romans by Respondent requiring her to work alone, notwithstanding its knowledge of her inability to climb on ladders and roofs and to be in confined spaces such as crawl spaces was so onerous that it caused and was intended to cause Romans to resign. I find that the abruptness of the change in Roman's working conditions is evidence of disparate treatment against Rhodes and Romans because of their perceived support of the Union and because of Roman's testimony at the National Labor Relations hearing. I reject Respondent's defenses to this constructive discharge as pretextual. I find that Respondent has not rebutted the prima facie case by the preponderance of the evidence. *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976); *Convergence*

Communications, Inc., 339 NLRB 408 (2003); *Five Cap Inc.*, 332 NLRB 943 (2000); *Grand Central Partnership*, 327 NLRB 966 (1999).

With respect to the failure to hire Rhodes or to continue Rhodes in his unofficial employment status, this case is covered by *FES, A division of Thermo Power*, 331 NLRB 9 (2000) in which the Board held that General Counsel must show that: (1) the employer was hiring or had concrete plans to hire at the time of the unlawful conduct; (2) the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that the employer had not adhered uniformly to such requirements; or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants.

I find this case meets the requirements of FES. There was ample evidence that Respondent had committed to hire Rhodes and had already scheduled his drug test which would have been the final step in the hiring process. Moreover Kingery had informed Rhodes that his application had been approved. Respondent did not produce any evidence that Respondent was not hiring. In fact the "official" employment of Rhodes was, in terms of manpower, no change from Rhodes "unofficial employment". The record also demonstrates that Rhodes had the necessary experience and training for the position in terms of past experience performing satellite tech work as well as in excess of the year of which Rhodes had been performing the job for Respondent. The evidence of animus against the Union is overwhelming as set out elsewhere in this decision. The defenses asserted by the Respondent concerning alleged lack of insurability and the need to live in the DMA are clearly pretextual and are rejected.

I thus find that Respondent has failed to rebut the prima facie case and that Respondent also violated Sections 8(a)(1), (3) and (4) of the Act by its failure to hire and/or continue to employ Kevin Rhodes.

Subcontracting

Respondent had historically used some contractors in its Columbus Warehouse operation to meet work load demands, particularly during peak busy times in the fall and continuing up to the holidays. In 2003, Respondent's largest customer DirecTV demanded that Respondent make its contractors, employees of Respondent as a condition of Respondent's continuing to receive DirecTV's business. Consequently, Respondent offered its contractors the opportunity to become employees. The greater majority of Respondent's contractors, with the exception of a few, chose to become employees with the Respondent continuing to use the contractors. There are four principle categories of work. They are the original installation which are the most lucrative, and the upgrades, repairs and service calls which pay substantially less. Until the summer of 2004, the tech employees were generally assigned the installation jobs up to their capacity to handle them and the contractors were assigned the less lucrative service and upgrades and repair jobs. The Columbus warehouse operation served several counties and Head Area Technician Kingery generally assigned the Tech employees to the areas and counties where they lived or nearby. This enabled the tech employees to handle their job assignments more efficiently by eliminating a great deal of

travel time and to perform more jobs during the work day and earn more money as a result. However, this system was changed by Respondent in the late summer and fall of 2004. In September 2004, Union representative, Dennis Painter, began to hear complaints from the tech employees that they were being assigned fewer of the lucrative installation jobs which were then being assigned to the contractors. Painter raised this issue with Respondent's collective bargaining representative Richard Schneider at one of the bargaining sessions in 2004. Schneider denied knowledge of this and stated that the less lucrative service jobs were to be assigned to the contractors. During this bargaining session Painter asked Schneider for the DirecTV contract and for information of the type and number of jobs then being performed by the contractors which had been formerly performed by the bargaining unit tech employees. Schneider responded, "I hear you", Painter then inquired what this meant and whether Respondent would give him this information and Schneider replied in the negative. It was not until the hearing in this case that Respondent finally furnished the UE Union some of this information and the DirecTV contract after certain portions thereof were redacted. However, prior to this Respondent failed and refused to furnish the UE Union with the requested information and the DirecTV contract. The Respondent maintained a log of these jobs which was kept up on a daily basis. The lead tech employees could look at the list which would set out the type of job assigned and who it was assigned to. The employees noted that the logs showed that the contractors were receiving the lucrative installation jobs. The employees complained to Kingery about this change in the method of the job assignments. Shortly thereafter Respondent removed the contractors' names and the jobs they were receiving from the list. This situation continued until the Spring of 2005, when the majority of the Respondent's tech employees at its Columbus warehouse were forced to resign because of the substantial loss of the lucrative installation jobs to the contractors. During this period Kingery also abandoned the practice of keeping the tech employees working in the counties and areas near them as much as possible. Thus, in addition to the loss of the lucrative installation jobs to the contractors, the tech employees were now required to work in distant counties and areas, further negatively impacting their earnings. On some occasions the small remuneration they received for the job was barely enough to cover their gasoline and mileage cost. During this period Kingery made several remarks to lead tech employee Hays that the Respondent was going to starve out the employees and condense the size of the bargaining unit in order to force the Union out. During this period of time Kingery also told tech employee Hays that Schneider had opened up a secret warehouse that the Union would not find out about. In March of 2005, Kingery encouraged some of the tech employees to resign their jobs and to apply with the Cleveland, Ohio warehouse which was then being assigned the lucrative installation formerly assigned through the Columbus warehouse. However when they applied they were rejected by Respondent. Satellite Regional Manager Mike Nickell told them that he could not hire them because Production Workers Local 707 represented the employees at this warehouse and they were in the Columbus Warehouse bargaining unit. As a consequence of Respondent's actions as set out above a substantial number of the tech employees at the Columbus warehouse were forced to resign as they saw their bi-weekly earnings shrink from $1700 to $200 to $400. During this period Kingery and Hays were continuing to gather signatures for a petition to decertify the Union as the bargaining representative for the Columbus warehouse employees. Kingery told the employees they would again be permitted to work in and near their home areas and counties after the Union was decertified. During this period Respondent continued to maintain the lawsuit in the federal district court for enforcement of its agreement with Local 707 to eliminate the Union

as the representative of the Columbus bargaining unit. As a result of Respondent's conduct as set out above the Columbus bargaining unit was reduced from 55 employees to 26 employees as of the first day of the hearing in this case. I find the testimony of witnesses Richard Hays and Tech employees John Rostofer, Mike Meddings, William Bright, Brian Hahn, Tony Dutton, Choozah Vargus, Dave Higdon, James Girton, Jeffrey West and Scott Myers, was credible and mutually corroborative. It demonstrated that the Respondent's transfer of the Columbus warehouse bargaining unit work to the contractors was designed to decimate the UE bargaining unit by starving out its members. Further the testimony of Respondent's supervisor and agent Kingery and the Union's International representative Painter and Schneider amply demonstrates that the Respondent's motivation in transferring work out of the bargaining unit was to get rid of the Union. There were a substantial number of incidents which support the findings of unlawful discrimination in this case: Kingery told Richard Hays that the reduction in work assigned to the Columbus bargaining unit employees would be used as a tool to get rid of employees who caused problems. Meddings testified that Kingery told the employees he was asking them to sign a decertification petition and that if they got rid of the Union, they could get rid of the contractors. Bright testified that Kingery told the employees that the contractors would go if they signed a decertification petition and brought back Local 707. Kingery, himself, testified that on November 1, 2004, seven northern counties in the Columbus market area were transferred to a warehouse in Cleveland, Ohio, represented by Production Workers Local 707. Kingery also testified that the Cleveland warehouse had 70 technicians whereas the technicians at the Columbus warehouse went from 55 in May 2004, down to 26 on the first day of the hearing in this case. Kingery also testified that Nickell told him that Respondent would let the Columbus market "condense down". Myers testified that he was assigned by Kingery to interview applicants for jobs but to forward the promising ones to work for the contractors. Schneider testified he did not give work to the employees in the Columbus bargaining unit who were represented by the Union because representative Painter had contended that the contract followed them. Kingery told Myers he would take care of the older techs who "cared" about their jobs and took the drastic step of telling these favored employees to resign from their jobs at the Columbus facility and go to work for a contractor named Lonnie at another warehouse in Edison, Ohio. Some of the employees resigned but were not hired by Lonnie and were rehired by Kingery. Dutton testified that Schneider told him the work was not coming back. It is clear from the testimony of the employee witnesses and Respondent's representatives and representative Painter that Respondent ran a covert operation designed to deprive the Columbus bargaining unit of their work by transferring it elsewhere and concealing this information from the Union and by refusing to furnish the Union essential information for them to learn of Respondent's plan and efforts to dislodge the Union from its status as collective bargaining representative of the unit employees. Schneider also gave the Union inaccurate information when Schneider told Painter in September 2004, that only service work was being assigned to the contractors.

Analysis

There is no other plausible reason for Respondent's actions against these employees through the elimination of their livelihood other than retaliation against them because of their exercise of their Section 7 rights by their support of the Union. I thus find that the General Counsel has established violations of Sections 8(a)(3) and (1) of the Act by Respondent's conduct as set out above and that Respondent has failed to rebut the prima facie case by the

preponderance of the evidence. *Wright Line,* 251 NLRB 1083 (1980) enf. 662 F.2d 899 (1st Cir. 1981).

It is axiomatic that an employer's subcontracting of unit work in retaliation for the unit employees' support of the Union is violative of Section 8(a)(3) and (1) of the Act. *Gaetano & Associates, Inc.*, 344 NLRB No. 65 (2005); *Joy Recovery Technology Corp., 320 NLRB 356, 365 (1995); Westchester Lace, Inc.*, 326 NLRB 1227, 1227 (1998) (1998). See also *Jays Foods, Inc. v. NLRB*, 573 F.2d 438, 445 (7th Cir. 1978) enforced in relevant part, 228 NLRB 423 (1977) relying on employer's other unfair labor practices as evidence of anti-union motives for subcontracting work and inferring anti-union motivation from the timing of the decision to contract out work. In the instant case before me the Respondent commenced the contracting out of unit work within a few months of its recognition of the Union.

I also find that the General Counsel has established a prima facie case of violations of Sections 8(a)(5) and (1) of the Act by the unilateral removal of the work from the Union bargaining unit, by failing and refusing to provide the Union with timely notice of any proposed unilateral changes and an opportunity to bargain concerning them. Respondent has failed to rebut the prima facie case by the preponderance of the evidence.

Subcontracting of work such as was involved in this case is a mandatory subject of bargaining and the employer had an obligation to give the Union specific reasonable notice and an adequate opportunity to request bargaining until agreement had been reached or a valid impasse had occurred. *Fiberboard Paper Products Corp.*, 379 U.S. 203 (1964); *NLRB v. Plymouth Stamping Div., Eltec Corp.*, 870 F.2d 1112 (6th cir. 1989) In this case, not only did the Employer fail to give the Union specific notice of the subcontracting of bargaining unit work, but the Respondent actively concealed the subcontracting and rebuffed the Union's attempts to obtain information that could have provided the Union notice. Clearly the Respondent violated Section 8(a)(5) and (1) of the Act by its failure and refusal to furnish the Union with notice of the subcontracting and failed to provide it with an opportunity to bargain.

The status of the Union

The complaint alleges, Respondent admits and I find that the fallowing employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All satellite technicians, including head area technician and clerk employed by [Respondent] at its Columbus, Ohio facility; but excluding all professional employees, guards and supervisors as defined in the Act.

Paragraph 11(b) alleges, Respondent admits, and I find that since about March 17, 2004, and at all material times, the Union has been the designated exclusive collective bargaining representative of the unit and since March 17, 2004, the Union has been recognized as the representative by Respondent and that this recognition has been embodied in a Settlement Agreement approved on March 17, 2004, in Cases 9-CA-41052, et al. by an Administrative Law Judge of the National Labor Relations Board. In reliance on the

foregoing the complaint alleges in paragraph 11(c) and I find that at all times since March 17, 2004, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit for the purposes of collective bargaining. I reject Respondent's various defenses to this conclusion raised by the Respondent such as the lack of "dues paying" members of the bargaining unit, the alleged fraudulent obtaining of signatures on Union UE authorization cards and the like as without merit as these issues have been resolved by the Settlement Agreement entered into by the parties.

Board law is clear that employers have an obligation to bargain with the duly recognized exclusive collective bargaining representatives of their employees in the appropriate bargaining unit. This bargaining obligation requires that employers furnish the union that represents their employees, specific notice and a reasonable opportunity to bargain concerning mandatory subjects of bargaining. Mandatory subjects of bargaining include wages, hours and other terms and conditions of employment. The bargaining obligation encompasses the furnishing of information requested by the unions in order for the unions to adequately represent the employees in the appropriate bargaining unit. The bargaining obligation encompasses good faith bargaining on the part of the parties and reasonable efforts of the parties to reach agreement. When an employer seeks to obtain a change in its bargaining unit employees' wages, hours or other terms and conditions of employment, it must notify the Union and give it an opportunity to request bargaining. If the employer gives the Union specific notice of the proposed change, the Union must request bargaining within a reasonable period of time or it will be deemed to have waived its right to do so. In the event that the Union waives its right to request bargaining after sufficient notice, the employers may effect the change. In the event that the parties reach agreement on the change by bargaining the employer may effect the change. However if the union does not agree to the change, the employer is not free to make the change until the parties have bargained in good faith and reached a valid impasse in which case the employer may effect the change. A waiver of a unilateral change by a union does not constitute a waiver of future changes.

Unilateral changes in mandatory subjects of bargaining

Respondent's change of its policy
regarding providing small parts to Unit employees

This change affected the employees' compensation as it required the employees to pay for their small parts whereas Respondent had formerly provided the small parts at no charge to the employees. The testimony of the witnesses concerning this allegation supports the undisputed conclusion that the change occurred. The testimony differs as to whether the change occurred prior to or on or after March 17, 2004, which is the date the Union was recognized in this case. The General Counsels contend that the change occurred after the March 17th recognition of the Union which would be an unlawful unilateral change. Respondent contends that the change was made prior to the March 17th recognition of the Union. I find that the testimony of the witnesses and the exhibits received concerning this issue are in conflict as to whether the change in the small parts policy occurred prior to or after the March 17th recognition of the Union. The earnings statements of employee David Higdon do not contain deductions for small parts for the pay periods ending March 14 and 28, 2004. However, Higdon's earnings statement for the period ending April 11, 2004, contains a

deduction for small parts. Girton testified that this change occurred after March 2004. Meddings testified the change occurred in March 2004. Dutton testified the change occurred in the early summer of 2004. Hahn placed the change before March 2004. Kingery testified the change occurred prior to March 2004, but was not certain of the date. Employee Nick Morava testified that the small parts deduction policy became effective on March 4, 2004, as supported by his "Install Materials Ledger Sheet" Respondent also notes that Respondent's Policy Manual indicates under Pay Cycle (R. Exh. 8 p. 21) paragraph A as follows:

> **Pay Cycle**
>
> A. Payday is normally on every other Friday for services performed the two (2) week period ending the second Monday prior at 12:01 AM for hourly and salaried employees (third Monday prior for Job Based employees, and effective 2/12/04 third Wednesday prior). The bi-weekly pay schedule is made up of twenty-six (26) pay periods per year.
>
> B. Changes will be made and announced in advance whenever JBM, INC. holidays or closings interfere with the normal pay schedule.
>
> **Pay Period and Hours**
>
> Our payroll work week begins on Monday at 12:01 a.m. and ends on Sunday at 12:00 midnight. Effective 2/12/04, Job Based Employees payroll work week will be Thursday 12:02 a.m. and end on Wednesday at 12:00 midnight, while hourly and salaried employees will remain Monday thru Sunday. Other departments may vary, please see your supervisor.

From the foregoing Respondent contends that "the pay period ending April 11, 2004, (GC Exh. 47c) where Higdon's first small parts deductions were made, was based upon the 2004 calendar, for the period of work starting March 4, 2004 through March 17, 2004". Respondent further contends that this is consistent with the deductions for Morava and establishes that the small parts policy commenced in late February or early March 2004.

I find that the testimony and exhibits presented in this case are in conflict and insufficient to establish a violation of the Act and will recommend the dismissal of this allegation.

Change in Respondent's Policy for Start Times and Pre-Calls

It is undisputed that Respondent changed its policy regarding start times and pre-calls for unit employees. The General Counsels contend that these changes occurred after March 17, 2004, which was the date the Union was recognized. General Counsels contend that previously, "Respondent's policy was quite flexible, allowing unit members a great deal of latitude in deciding when to do their first job of the day and encouraging, but not requiring, them to pre-call their customers before going to perform work." General Counsels contend that after the Union was recognized, "Respondent imposed rigid requirements about when they had to be at their first jobs of the day and mandated that employees pre-call their

customers." In support of this position, General Counsels relied on the testimony of certain of the employees. Meddings testified that Respondent began imposing this requirement that they arrive at the customers' home by 8:00 a.m. around June or July, 2004. Girton testified that Respondent imposed this new requirement around the summer of 2004. Rostofer testified this change occurred in January 2005. Bright testified it occurred around February or March 2005. Meddings testified that pre-calls became mandatory in March 2004.

Respondent notes that "not one shred of documentary evidence was offered to substantiate the allegation". It notes that employee witness "John Rostofer, who was employed by Respondent in "March or April 04" through March 2005 testified that "when I began there, "seven o'clock was start time." As in the case of the prior allegation I find the testimony presented by the parties is in conflict and I find it is insufficient to establish a violation of the Act. I am not convinced that these changes were made after the recognition of the Union on March 17, 2004, and find that the General Counsels have failed to meet their burden of proof. I shall also recommend the dismissal of this allegation.

Alleged Change in Policy for Compensation for installing Telephone Lines of 25 feet to 100 feet in length and installing Pole Mounts or Ground Mounts

General Counsels assert that "Technician witnesses testified that about the middle of April 2004, Kingery announced, at a technician meeting, that there would be a change in the phone line as well as the pole mount or ground mount policies." Prior to this technicians were allowed to charge customers a $50 fee if the phone line was over 25 feet and keep half of the fee. After this change the job, according to the testimony of employee Morava, took 25 to 75 percent longer but the technicians were not permitted to charge for the additional time. Meddings testified that Respondent changed this practice around mid-year 2005.

With respect to pole mounts and ground mounts, the change required the installation of the mounts as requested by the customers but only allowed the technician to charge a $99 fee of which the technician kept $50 if the customer did not need the installation to obtain service. As a result of the change the technicians received less money. Meddings testified that Respondent implemented this change around July 2004. Respondent also unilaterally reduced employee compensation for "US Upgrades" from $50 to $15.

Respondent notes that Richard Hays identified the "Employees Pay Sheet" (GC Exh. 37) in effect on March 8, 2004. This Pay Sheet indicated, "Pole Mounts" was in effect on March 8, 2004, which was prior to the recognition of the Union.

I find Respondent did unilaterally implement the aforesaid charges in its pay policies wit respect to compensation for installing telephone lines and pole and ground mounts. I find the documentary evidence relied on by the Respondent to be dispositive of this case. I find that these changes in compensation were mandatory subjects of bargaining. I find that the Union had not been recognized until March 17, 2004, and that the Union was not recognized at the time these changes were implemented by the Respondent. I find the allegation should be dismissed.

Change in policy regarding
compensation for employees employed less than 90 days

General Counsels contend that the testimony establishes "prior to approximately June 2004, all employees were paid the same but at that time Respondent changed its payroll to a 'yellow' and 'green' payroll sheets system which differentiated between those employees employed either less than or over 90 days and their amount of pay". The change was announced by Kingery at a technician meeting and impacted the new employees who consequently made less money. Meddings testified that Kingery made this announcement in March 2004. Pay Sheets demonstrating the changes were admitted. Bright was hired in May 2004, and was paid less than the other employees for 90 days. Girton testified this change occurred in early 2004, but was unable to place the date. Morava testified the change occurred in June of 2004.

I find that this deduction in compensation for employees with less than 90 days service with respondent obviously affected these employees' wages and was a mandatory subject of bargaining. I find that the Respondent unilaterally made this change without notifying the Union and giving it an opportunity to bargain concerning it. I find that the Respondent has not established that the change was put into effect prior to March 17, 2004, the date that the Union was recognized as the exclusive collective bargaining representative of the unit employees. I thus find that Respondent violated Section 8(a)(5) and (1) of the Act by the unilateral implementation of the deduction of pay of those employees who were employed for less than the 90 day period.

Change in Respondent's Policy regarding
the amount of Compensation for Service Calls

General Counsels contend that the "evidence shows that after March of 2004, Kingery, on behalf of Respondent, announced to employees that they would be paid only $15 for service calls regardless of length of time or who had installed the lines. Morava testified there were times when 2 to 4 hours were required to complete the service call and the technician would only be paid $15. Prior to this change technicians could be paid additional amounts depending on the installer". Previously the technicians making service calls only had to get the customer's satellite working but after the change the technicians were required to bring the satellite dish up to Respondent's standards. This resulted in a substantial increase in their time on service calls but did not increase their compensation.

Respondent contends that the Employees Pay Sheet in effect on March 8, 2004, indicated a "Service Call" rate of $15 and that this rate has not changed since recognition of the charging Party and that this allegation should be dismissed.

I find however that Respondent's Employees Pay Sheet does not address the additional work due to the policy change requiring employees making service calls to not only repair the service but to bring the installation up to standard even though it had been installed by someone else. This then required the technician to perform additional duties requiring additional time without additional compensation which resulted in a net pay loss.

I credit the unrebutted testimony of Morava as set out above. I find the requirement that technicians perform additional work without receiving additional compensation for doing so was a unilateral change of a mandatory subject of bargaining and that the implementation of this change by Respondent without providing the Union with specific notice and an opportunity to bargain, was violative of Sections 8(a)(5) and (1) of the Act.

Alleged Change in Attendance Policy
regarding the requirement of a Physician's Statement for Absences

Employee Meddings testified that in late March or April, 2004, Respondent followed the practice of requiring a doctor's excuse after an absence of 2 days as set out in the handbook. Subsequently, Kingery announced that on each occasion an employee was off sick, the employee must bring a doctor's note in. Employee Bitler testified that at a tech meeting in the beginning of April 2004, Kingery announced to the employees that any time they were sick even one day they must bring a doctor's note on their return to work. (Tr. 601, 991-992). Girton testified that sometime after March 2004, Kingery told him he must bring in a doctor's note for an absence he had two weeks before. Meddings testified around March or April, 2004, the actual practice changed from requiring a doctor's note only if the employee was out sick for a week to requiring a note for only one day the employee was off sick. Respondent's policy regarding "Absence or Lateness" in Paragraph D of its policy manual in May 2003 states:

> If you are absent because of an illness for two (2) or more successive days, your supervisor may request that you submit written documentation from your doctor stating you are able to resume normal work duties before you will be allowed to return to work. (underlining added)

I find credible, the foregoing testimony that in early April 2004, Respondent's manager Kingery announced to the employees at a tech meeting that they must furnish a doctor's note to Respondent even if they were absent for only one day. This was a departure from the two day requirement contained in the Respondent's policy manual and from the actual practice which was more lax than the rule in the policy manual. I find that the change in policy announced by Kingery was a mandatory subject of bargaining and that Respondent did not give the Union notice and an opportunity to bargain prior to its implementation. I find Respondent's unilateral change was violative of Sections 8(a)(5) and (1) of the Act.

Respondent's change in Policy by reducing "Tech Days" from 2 to 1 per week

It is undisputed that after March 17, 2004, when Respondent's bargaining obligation with the Union was initiated, Respondent unilaterally reduced the number of days that the tech employees were required to be at the warehouse from 2 days to 1 day each week. This resulted in less association among the technicians and less time in the shop. It also required the technicians to carry more parts as a result of the reduction of the days they were in the warehouse. Kingery admitted making the change but contended it was a benefit. Respondent contends that the reduction in tech days allowed the technicians to spend less time at work and that there is no proof that the reduction of tech days was a change in working conditions.

I find that the reduction in tech days from 2 to 1 affected the employees' terms and conditions of employment and was thus a mandatory subject of bargaining and that Respondent violated Sections 8(a)(5) and (1) of the Act by the unilateral reduction in the tech days. There is no doubt that this change impacted the employees' working conditions. It is irrelevant whether this change be viewed as a benefit or detriment to the tech employees. This change was violative of Sections 8(a)(5) and (1) of the Act.

Respondent's change in policy by requiring employees to work on the day before Labor Day

General Counsel presented testimony from employees Morava, Meddings, Dutton and Vargus that Respondent commenced requiring its tech employees to work Labor Day or the day before in September 2004. Kingery did not dispute this testimony but he attributed the change to DirecTV rather than to the Respondent. According to Morava, Labor Day work was not previously required and the work was performed on a voluntary basis and the employees who performed the work on the holiday received a $10 bonus. Respondent contends that it is not logical that holiday work was not required or performed. This contention was not developed by Respondent at the hearing.

Respondent cites two editions of the Respondent's Policy Manual which it contends, refute the allegations concerning Labor Day. The manual recognizes several holidays including Labor Day and states that to be eligible for holiday pay, the employee must work the last scheduled day immediately preceding and the first scheduled day immediately following the holiday. It further states that job based technicians who are scheduled to work on a holiday shall be paid for the work they do that day, plus the holiday pay.

I credit the unrebutted testimony of the technicians as set out above. I find that notwithstanding the language contained in the employee manual, holiday work was conducted on a voluntary basis and the change in the Labor Day holiday procedure announced by Kingery in the summer of 2004 was a change in the past practice that the Respondent had followed. This was a unilateral change in a mandatory subject of bargaining which affected the employees' wages, hours and other terms and conditions of employment. The Respondent ignored its obligation to afford the Union specific notice and a reasonable opportunity to bargain and thus violated Sections 8(a)(5) and (1) of the Act.

The implementation of the ESOP

The Union's international representative Painter testified that at a late August 2004, bargaining meeting Schneider indicated he was considering an ESOP (Employee Stock Option Plan) for the employees. Painter informed Schneider that the Union did not favor such a plan and asserted the greater risk of such a plan having its assets in company stocks. Painter later learned that Respondent had engaged an attorney David Johanson, who specialized in ESOP plans. Painter sent a letter to Johanson advising him that the parties were bargaining for a labor agreement and that he did not believe Respondent was attempting to reach agreement. At a later bargaining meeting, Schneider presented Painter a document indicating that Respondent had implemented the ESOP and told Painter that he had done so. Painter also learned from bargaining unit employees that information about the plan was posted at the warehouse. Painter told Schneider that he had an obligation to bargain the plan as a

mandatory subject of bargaining and later spoke to Schneider on two or three occasions again about this.

Respondent relies on the March 17, 2004, date of the recognition of the Union in defending against this allegation. Respondent presented the testimony of attorney Johanson that his firm prepared the ESOP plan for Respondent in 2002, to become effective on January 1, 2003, which preceded the March 17, 2004, recognition of the Union. Johanson testified that the Internal Revenue Code required that notice be given to all employees by September 15, 2004, and that the notice was provided to the employees and to the Union. Johanson further testified that the plan "did not affect wages," has "no employee contributions," and "does not operate as a retirement plan," and does not "advance employees' interest as employees," but only as entrepreneurs. (tr. 1646-1654).

Respondent relies on *Pieper Electric, Inc.*, 339 NLRB 1232 (2003); *Harrah's Lake Resort*, 307 NLRB 182 (1992) which states "An ESOP which seeks to give employees an interest in the employer's company is not a mandatory subject of bargaining." Respondent contends that the testimony of Johanson is consistent with documents introduced by General Counsels in GC Exh. 5 which states, ". . . Plan that JBM, Inc., established in 2003" and Summary Annual Report which states, "for the period January 2, 2003." Based on the foregoing Respondent concludes that the ESOP is not a mandatory subject of bargaining and that no violation of the Act occurred.

The General Counsels note that the Board has found that when an ESOP is operated so as to constrict wage payments as the employer makes matching contributions or operates it as a retirement plan, it is a mandatory subject of bargaining, citing *Richfield Oil Corp.*, 110 NLRB 356 (1954); *Foodway*, 234 NLRB 72 (1978). General Counsels also contend that if the plan is not operated as a pension plan on behalf of employees but only as entrepreneurs, owners and managers, it is a non-mandatory subject of bargaining citing *Pieper Electric, supra*.

Charging Party contends that Respondent unilaterally implemented an ESOP without notifying the Union or affording it an opportunity to bargain prior to implementation. Charging Party notes that in *Lynn-Edwards, Corp.*, 290 NLRB 202, 204 (1988) the Board held that "ESOP's by statutory definition, are retirement plans even if they are funded from the profits of a Company." Charging Party further contends that the Respondent's Trust Agreement mirrors the language of the Lynn-Edwards Trust Agreement. Charging Party concludes that the Respondent's implementation of the Trust agreement was a mandatory subject of bargaining citing *Century Wine & Spirits*, 304 NLRB 338 (1991); and *Foodway, supra*.

General Counsels conclude that the ESOP was a mandatory subject of bargaining. The subject was raised by Respondent during bargaining. Johanson testified he developed two types of plans, an employee stock ownership plan and an eligible individual account plan. It is undisputed that Respondent notified the employees directly of the plan and did not contact the Union prior to the implementation of the plan. Although Johanson testified that no stock distributions from either plan have been made to any of Respondent's employees, the General Counsels note that in *Richfield, supra,* the Board held a plan to be a mandatory

subject of bargaining where no stock distributions were made until after the employees had retired from their employer.

I find that Respondent violated Sections 8(a)(5) and (1) of the Act by Respondent's unilateral implementation of the ESOP without giving the Union specific notice and an opportunity to bargain. I find in agreement with the General Counsels and Charging Party that the ESOP plans were a mandatory subject of bargaining and that Respondent bypassed the Union and went directly to the employees in its unilateral implementation. I find that the *Pieper* case and the others cited herein are supportive of General Counsels' and Charging Party's contentions. I reject Respondent's contention that it had no duty to bargain with the Union because the plan was drawn up in 2003, prior to the recognition of the Union. It is clear that the plan was being developed and presented for Internal Revenue Service approval well after the date of recognition of the Union. It was by no means a fait accompli at the time that the Union was recognized on March 17, 2004, and forward. In this case the Respondent did not give the Union specific notice of the plan's state of development and that the Respondent was in the process of preparing its implementation. The casual mention of its interest in an ESOP plan by Schneider to Painter at a collective bargaining meeting did not give the Union notice that the process of approval and impending notification was underway.

Respondent's Implementation of Policy denying the employees' work assignments until they provided information about their vehicle

Meddings testified that in January or February 2005, Respondent began requiring that employees provide information about their vehicles and informed employees they would not be assigned work until Respondent provided the information. Kingery conceded that in March 2005, Respondent sent a letter to employees requiring certain information about the vehicle insurance and the make, model and vehicle identification number. Kingery testified, "it was all information requested by DirecTV". Kingery testified this was all information that had been required in the past for vehicles that were in a vehicle lease program, but that sometimes the Company had to bypass the requirement of a new or like new vehicle in busier times because of the need for technicians.

I find that the Respondent did institute a new policy as testified to by Meddings and conceded by Kingery. It may well be that this was required by DirecTV but it was nonetheless a mandatory subject of bargaining and Respondent instituted this unilateral change without affording the Union with specific notice thereof and an opportunity to bargain. In so doing the Respondent violated Sections 8(a)(5) and (1) of the Act.

Respondent's implementation of a Mandatory Sunday Work Schedule and cessation of paying a bonus for Sunday Work

Prior to 2005, the technicians were not required to work on Sunday. In March 2005, Respondent instituted a new policy by regularly scheduling the Tech employees to work on Sunday according to the testimony of Hays and Morava. Rostofer, Meddings, Bright, Dutton and employee Jeffery West also testified that Respondent began to require that its employees work on Sundays on a regular basis commencing in 2005. Vargas also testified to this change but placed the change in September 2004. Kingery testified that Respondent ceased offering a

Sunday bonus in 2005, as required by DirecTV. Rostofer testified, ". . . , if they needed, if DirecTV wanted you to work, then they would ask for volunteers to work Sundays, which usually they always got them. But if it was something through DirecTV, then they would make it mandatory, you know, if they didn't have enough volunteers to work".

Respondent contends, "absent testimony by a few General Counsel witnesses, no witness or evidence was ever submitted to prove that working Sunday was not required by contract or Company Policy". Respondent relies on, "Company Policy in effect prior to recognition of the Charging Party provides":

Pay Period and Hours

> Our payroll work week begins on Monday at 12:01 a.m. and ends on Sunday at 12:00 midnight. Effective 2/12/04, Job Based Employees payroll work week will be Thursday 12:01 a.m. and end on Wednesday at 12:00 midnight, while hourly and salaried employees will remain Monday thru Sunday. Other departments may vary, please see your supervisor.

Charging Party contends that Respondent may argue that "to the extent its policy manual contradicts its past employment practices, the manual should control in determining if it has changed its policy. However, under current Board law, an employer's written policies are trumped by contradictory past employment practices". Citing *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001).

I credit the unrebutted testimony of the employee witnesses as set out above and find that Respondent did have a past practice of not requiring its employees to work on Sunday and obtaining volunteers if work was required. This apparently changed as DirecTV required Respondent to comply with its demands that Sunday work be regularly performed by the employees. However as noted by the Charging Party the actual past practice in this case takes precedence over the unilaterally imposed manual which was apparently not utilized to require Sunday work until March 2005. Moreover, I find the paragraph of the manual cited above does not specifically address Sunday work but merely sets out the work week from one point to another, I find that the testimony of the employee witnesses supports the finding that Sunday work was not mandatory until the change instituted in early 2005. I find that Respondent's unilateral imposition of the mandatory requirement of Sunday work, was violative of Sections 8(a)(5) and (1) of the Act.

Respondent's implementation of a Policy
requiring Employees to have a "Lockdown" ladder rack on their vehicles

In March 2005, Kingery announced that Respondent would begin to enforce a "lockdown" ladder rack requirement under threat of suspension. Morava testified that this prompted him to buy a new truck which had a lockdown ladder rack. Employees were told by Kingery that if they did not have a lockdown ladder rack on their vehicle, they would be required to purchase one. Kingery noted that DirecTV began to require the ladder racks but contended that the rule was never enforced.

I credit the unrebutted testimony of the employees as set out above and find that this new requirement was announced in early 2005. This concerned a mandatory subject of bargaining affecting their costs of obtaining the lockdown ladder racks. Respondent unilaterally instituted this new requirement without affording the Union notice and an opportunity to bargain this with the Union in violation of Sections 8(a)(5) and (1) of the Act.

Respondent's Implementation of a Policy of Deducting the Cost of Equipment from Employees Paychecks without first giving he Employees the Opportunity to Account for Equipment

In March 2005, Respondent instituted a new policy that technicians could no longer keep their boxes on their trucks for 30 days or they would be back charged. Kingery announced these changes directly to the employees without any notice to the Union. Bright testified Respondent began charging employees for DirecTV equipment which was not installed in 60 to 90 days. West testified that in late 2004, he was missing a TiVo receiver and Respondent gave him the opportunity to find it so it was not deducted from his pay. In February or March 2005, the value of another TiVo receiver was deducted from his pay with no prior notice from Respondent.

I find that the foregoing change directly affected the cost to the employees and was a mandatory subject of bargaining. Respondent's unilateral imposition of this change violated Sections 8(a)(5) and (1) of the Act.

Summary of Unilateral Changes

In their argument General Counsels contend and I have found that the foregoing changes found unlawful by the undersigned, impacted on the employees' terms and conditions of employment and were thus mandatory subjects of bargaining. Respondent called Schneider as its principal witness in this case. General Counsels make a valid point in their argument that "Schneider's testimony was for the most part simply a reference to his prior position statements," to the Board and "do not constitute independent testimony or evidence".

Respondent's Failure to Provide Requested Information

With respect to the furnishing of information relevant to collective bargaining the Respondent consistently refused and/or failed to provide the Union with necessary and relevant requested information in a timely manner. Respondent's responses to the Union's requests for information ranged from outright refusals to furnish the information, ignoring the Union's request, providing the Union with only partial information, giving the Union outdated information and not responding to the requests for information for months at a time. The Respondent ignored the Union's initial request for bargaining which was made April 8, 2004. When it ultimately did commence meeting with the Union, it asserted that it was not obligated to furnish the names, addresses, telephone numbers and faxes of the bargaining unit employees because there was a question concerning representation ("QCR") While on the one hand the Respondent contended that its major customer, DirecTV's, wages and policies controlled what Respondent's unit employees' wages and hours and terms and other conditions of employment were, it refused to provide the Union with a copy of its contract

with DirecTV, until near the end of the hearing in this case thus placing the Union in a virtually impossible situation in attempting to bargain a labor agreement. In response to the Union's request for information concerning the medical insurance policy, Schneider furnished only an outdated summary of the plan and informed the Union that if it insisted on bargaining concerning insurance, the unit employees would have no insurance.

As noted above, on April 8, 2004, the Union's International Representative Dennis Painter sent a letter to Respondent's Human Resources Director, Richard Schneider requesting that Respondent commence bargaining with the Union. [1]Schneider replied by his letter of April 14, 2004 and advised Painter that Respondent did not recognize the Union. On April 23, 2004, Painter sent Schneider a letter and requested a list of all Respondent's employees, their current addresses, telephone numbers and fax numbers to prepare for negotiations. Painter testified that Schneider did not respond to the Union's request and told Painter he would not comply with the request because there was a question of representation ("QCR"). Painter sent another letter requesting the same information on June 8, 2004. Schneider informed Painter he would not comply with the request. Painter also sent Schneider another letter bearing the same date of June 8, 2004, enclosing a medical authorization form. Schneider refused to comply with this request. On June 21, 2004, Painter sent another letter listing 16 specific items the Union was requesting. Painter testified that Schneider did not furnish Item 1, the benefit plans or Item 4, a copy of Respondent's employees' insurance policy. It was not until September 2004, that Schneider responded to this request by sending the Union a summary of the insurance policy. Approximately 5 weeks after the June 21, 2004, letter request Schneider gave the Union a handbook containing some of the requested information. Painter testified that in November 2004, he sent a letter to Schneider setting out why he regarded Schneider's responses to this letter as not fully complying with his request. Painter testified that at a June 2004 bargaining session he requested that Schneider furnish him with the pay scales for the employees' classifications as the Union required this for bargaining but Schneider did not provide the information. Painter testified that approximately July 13, 2004, he asked Schneider at a bargaining session for vacation schedule and times and for information for holiday pay and training pay. Schneider did not provide this information. He also asked Schneider for information regarding Respondent's drug and alcohol program but the information was not provided. Painter also requested information concerning Respondent's disciplinary policy. It was not furnished until 5 weeks after the request. Schneider requested 44 items concerning the employees' terms and conditions of employment. This letter was prepared by Painter following his review of Respondent's initial bargaining unit proposal. Painter also renewed his request for the names, addresses, phone and fax numbers. Schneider asserted that he refused to supply the information because there was a question concerning representation. Painter subsequently repeated his request for items 22 and 23 contained in the July 16, 2004 letter for insurance and medical benefits. Schneider responded that Respondent did not negotiate insurance and that if the Union demanded to negotiate, the employees would have no insurance. Painter requested a copy of the Respondent's contract and policies with DirecTV because Schneider had informed him that Respondent's pay scale was contingent on DirecTV's pay scale and Painter needed to know this. On several occasions Schneider told Painter he would never get these

1 Schneider was the sole bargaining representative for Respondent throughout the initial bargaining and up to and including the instant unfair labor practice hearing.

items. Painter also testified that many of the items he requested in his July 16, 2004 letter were not furnished until months later. Respondent only provided a summary of the medical insurance policy and it had expired on July 30, 2004, prior to its being furnished to the Union. Painter testified further that at a bargaining session on October 4, 2004, Schneider gave him a letter dated on that date which purported to be in response to Painter's June 21, 2004, letter which had requested specific information from Respondent. Painter testified that many of the responses in this letter were inadequate to fulfill the requests for information for bargaining. On October 4, 2004, Painter received a second letter of that date from Schneider purporting to be in response to Painter's July 16, 2004 request for 44 specific items of information. Painter testified however that the answers were not responses to Items 22, 23, and 24 as set out in the July 16, 2004, letter which he had sent to Schneider.

I find that under the facts and circumstances in this case the General Counsel has established a prima facie case of violations of Sections 8(a)(5) and (1) of the Act by Respondent. I credit the testimony of Painter as set out above. I find that the information requested by the Union was relevant and necessary for collective bargaining. It is well settled that an employer violates Sections 8(a)(5) and (1) of the Act when it refuses or fails to provide a union with information which is necessary and relevant or that may lead to relevant information for collective bargaining. It is well settled that an employer violates Sections 8(a)(5) and (1) of the Act when it refuses or fails to provide a union with information which is necessary and relevant or that may lead to relevant information for collective bargaining. *Woodland Clinic*, 331 NLRB 735 (2000), citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB V. Truitt Manufacturing Co.*, 351 U.S. 149, 152 (1956); *Levingston Shipbuilding Co.*, 244 NLRB 119, 122 (1979), enforced 617 F.2d 294 (5th Cir. 1980). The names, address, telephone and fax numbers of the unit employees are presumptively relevant. *Garcia Trucking Service, Inc.*, 342 NLRB No. 75 (2004); *Jerry Cardullo Ironworks, Inc.*, 329 NLRB 443 (1999); *Dynatron/Bondo Corp.*, 305 NLRB 574, 574 (1991). Furthermore the information requested by the Union regarding Respondent's client, DirecTV including its pay polices and Respondent's contract with DirecTV were relevant because Schneider asserted that Respondent's employees' wages and terms and conditions of employment were directly related to and dependent on the wages and working conditions of the employees of DirecTV. *Garcia Trucking*, *supra*; *Phoenix Coca-Cola Bottling Co.*, 337 NLRB 1239 (2002); *NLRB V. Acme Industries Co.*, 385 U.S. 432, 437 (1967). Respondent's refusal to furnish the Union with a detailed description of the insurance plan rather than an expired summary of the plan was also violative of Sections 8(a)(5) and (1) of the Act. *IMIT-Bayonne*, 304 NLRB 476 (1991); *Ideal Corrugated Box Corp.*, 291 NLRB 247 (1988); *Borden, Inc.*, 235 NLRB 982, 983 (1978) enforced 600 F.2d 313, 317 (1st Cir. 1979). Respondent failed to provide the Union with information concerning its seniority policy, its layoff and recall policies, and its work rules *Praxair, Inc.*, 317 NLRB 435, 436 (1995). Respondent also failed to provide the Union with information concerning vacation costs. *MBC Headware, Inc.*, 315 NLRB 424, 427 (1994). Respondent also failed to provide the Union with the employees' rates of pay for the satellite technicians as requested by the Union, *Dyncorp Dnyair Services, Inc.*, 332 NLRB 602, 602 (1966). Respondent failed to provide the Union with information concerning its drug and alcohol testing policies. *Star Tribune*, 209 NLRB 543, 550 (1989). Respondent failed to provide the Union with information concerning costs of benefits, and information related to vacation benefits, training pay and holiday pay *MBC, supra*. Respondent also failed to provide the Union with requested information regarding subcontractors performing

bargaining unit work. *I Appel Corp.*, 308 NLRB 425, 441 (1992), enforced, 19 F.3d 1433 (6th Cir. 1994).

With respect to the issue of the timeliness of the responses to requests by the Union, the record is replete with evidence of the Respondent's failure and refusals to provide information for bargaining in a timely fashion. In the instant case the Respondent engaged in interminable delays in furnishing what information it did furnish. Often the requested information was not provided for months after the request. The delays themselves were violative of Sections 8(a)(5) and (1) of the Act. *Leland Stanford Junior University*, 307 NLRB 75 (1992); *Finn Industries, Inc.*, 314 NLRB 556 (1994); *Civil Service Employees Assn.*, 311 NLRB 6 (1993); *Consolidated Coal Co.*, 307 NLRB 69 (1992); *Valley Inventory Service*, 295 NLRB 1163 (1989); *Good Life Beverage Co.*, 312 NLRB 1060 (1993).

General Counsel contends in brief and I find that Respondent did not timely provide the Union with the information found relevant by the undersigned and this failure put the Union in an unfavorable position as the information was not available so that it could be used for collective bargaining.

Respondent's Dialatory Bargaining Tactics

The evidence is substantial to establish a prima facie case that the Respondent engaged in dilatory bargaining tactics by arriving late for meetings approximately 15 times, often leaving the meetings prematurely and canceling other meetings. Initially it should be noted that Respondent's only individual designated as its bargaining representative was Richard Schneider. Schneider owns a private airplane and used this vehicle to travel from his home in Wooster, Ohio to the meetings in Columbus, Ohio where the Union's in plant bargaining committee is located. Schneider was able to procure a meeting place at the Lane Aviation facility located across the road from the Columbus Airport at no charge in return for his purchase of fuel for his airplane. At the outset of bargaining the parties agreed to meet at each bargaining session for a period of five hours from 11:00 a.m. to 4:00 p.m. The parties met 25 times between commencement on May 14, 2004, and the final day of bargaining on February 23, 2005, Schneider initially presented his "last, best and final offer" on February 2, 2005. Schneider was late for 15 of those meetings and concluded seven of the meetings prematurely. He also unilaterally cancelled a meeting set for July 6, 2004, and failed to appear for a bargaining session set for September 9, 2004.

Respondent defends against this allegation noting that it was Schneider's use of the airport and his purchase of fuel that enabled him to obtain a meeting place complete with a caucus room and close to restaurants, copy equipment and computer internet access. Schneider testified at the hearing that flying in winter weather in Northern Ohio, he encountered numerous delays for thunder storms, strong winds, fog and snow storms. He testified he also encountered a delay for President Bush's airplane security, a delay for an aircraft problem and another when the hangar door where the aircraft was stored was frozen shut. He also testified that each of the delays was communicated to the Union. Respondent also contends that there was an average of 2.6 meetings per month with an average meeting time of over 3 hours.

Analysis

I find based on the foregoing that General Counsel has made a prima facie showing that Respondent was consistently late at these meetings. However, I find the Respondent has rebutted the prima facie case by the preponderance of the evidence which supports a finding that the delays were due to reasons beyond the control of the Respondent. I accordingly recommend dismissal of this allegation. I note in arriving at this finding that this allegation is a close call and that based on other conduct of Respondent as set out elsewhere in this decision, there is ample evidence to give rise to a suspicion that these delays were part of Respondent's unlawful conduct of violations of the Act.

The Regressive Contract Proposals and evidence of Respondent's deliberate actions taken to frustrate the collective bargaining process and the unlawful declaration that an impasse existed and its unlawful submission of its "Last, Best and Final Offer.

I find that the record supports a finding that Respondent engaged in a pattern of conduct designed to frustrate bargaining and to thereby destroy the Union's credibility among the unit employees in order to rid itself of the Union. I credit Richard Hays' testimony that Schneider told him he was going to delay negotiations and continue to offer regressive proposals in order to avoid reaching an agreement. This statement made by Schneider to Hays is significant as it occurred on the same day that Hays was taking a decertification petition to the Board's Regional Office in Cincinnati, Ohio. All of this occurred after the Union had delayed and refused meeting initially with the Union in April and May 2004, on the ground that the Union did not represent the employees because there was a Question Concerning Representation (QCR). In addition Respondent has maintained up to the last day of the hearing in this case, a lawsuit in federal district court in Ohio seeking to declare that another union represents the unit employees. The record as supported by the testimony of Painter and other Union bargaining committee members and as supported by Painter's bargaining notes demonstrates that Respondent was engaged in surface bargaining going through the motions of bargaining but refusing to bargain in good faith. The regressive nature of the proposals of Respondent and the Respondent's refusal and failure to turn over relevant information requested by the Union and the numerous unlawful changes were obviously intended to and had the effect of impeding the Union's efforts to reach an agreement. While the making of regressive proposals by an employer is not in and of itself a violation of the Act, they bear close scrutiny. In this case Respondent unlawfully declared an impasse and presented its "Last Best and Final Offer" which included Respondent's demands that the Union give up its rights to negotiate wages. The Last Best and Final proposal also gave the Respondent, the absolute right to assign the bargaining unit work out of the unit, something it already had done as part of its discriminatory campaign to rid itself of union adherents and to frustrate the Union's attempt to reach an agreement. Furthermore, the Respondent through its agent, Schneider, told the Union that the Last Best and Final proposal was not subject to counteroffers and refused the Union's request to bargain further. Schneider told the Union that he intended to implement the offer "no time soon." I thus conclude that the Respondent has violated Sections 8()(1) and (5) of the Act by engaging in surface bargaining and bad faith bargaining.

Conclusions of Law

1. The Respondent is an employer within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by the conduct of its supervisor and agent Columbus Head Area Technician David D. Kingery:

(a) Informing employees that supporting the Union was futile because Respondent would never agree to a contract with the Union, that there would be no health and life insurance because of the Union, that the Respondent would not offer the Union on behalf of the Unit employees anything matching or better than what the employees already had.

(b) Told the unit employees that they could not talk about the Union on Company time or on Company property.

(c) Told the unit employees that Respondent would subcontract bargaining unit work in order to reduce the size of the bargaining unit and get rid of the Union.

(d) Solicited an employee to denigrate the Union to other employees and encourage them to decertify the Union.

(e) Told an employee that Respondent was subcontracting work to cause bargaining unit employees to quit.

(f) Solicited employees to sign a prepared document to decertify the Union.

4. Respondent violated Section 8(a)(1) of the Act by the conduct of its Director of Resources, Richard C. Schneider:

(a) On several occasions, by telephone soliciting an employee to obtain signed statements from other employees repudiating the Union and initiating the filing of two decertification petitions.

(b) By telephone, interrogating an employee concerning his union sympathies.

(c) By telephone, directing an employee not to wear a union button.

(d) By telephone, soliciting and assisting an employee to file a decertification petition.

(e) At the Lane Aviation facility in Columbus, Ohio:

(i) Soliciting and assisting an employee to file a decertification petition.

(ii) Informing an employee that selecting the Union was futile by stating that Respondent was not going to agree to any contract with the Union.

(iii) Informing an employee that selecting the Union was futile by telling an employee that Respondent would make proposals that the Union would never accept and would propose less desirable terms of employment than those in existence at Respondent's other facilities.

5. Respondent violated Section 8(a)(1) of the Act by its issuance of a threat of discharge to employee Nick Morava because of his engagement in protected concerted activity.

6. Respondent violated Section 8(a)(1) of the Act by maintaining a rule in its policy manual prohibiting its employees from discussing their wages with co-workers under threat of discharge.

7. About March 22, 2004, Respondent violated Sections 8(a)(1), (3) and (4) of the Act by imposing more onerous terms and conditions of employment on its employee Alisha Romans by directing her to work alone and discontinuing the practice under which she had worked with a partner, Kevin Rhodes and thereby causing the termination of Alisha Romans.

8. About March 22, 2004, Respondent violated Sections 8(a) (1), (3) and (4) of the Act terminating Kevin Rhodes and/or refusing to hire him.

9. Respondent violated Sections 8(a)(1), (3) and (5) of the Act by, contrary to past practice, subcontracting bargaining unit work previously performed by unit employees, thereby reducing work opportunities for unit employees, causing Tony Dutton, Jamie Girton, Brian Hahn, Dave Higdon, Mike Meddings and Choozak Vargus and other similarly situated employees to lose employment through the reduced hours of work, by quitting, by lay off or by discharge.

10. Respondent violated Sections 8(a) (1) and (5) of the Act by making numerous unilateral changes in the following mandatory subjects of bargaining as follows:

(a) Change in Policy regarding compensation for employees employed less than 90 days.

(b) Change in Policy regarding the amount of Compensation for Service Calls.

(c) Change in Attendance Policy regarding the requirement of a Physician's Statement for Absences.

(d) Change in Policy by reducing "Tech Days" from 2 to 1 per week.

(e) Change in Policy by requiring employees to work either Labor Day or the day before Labor Day.

(f) The implementation of the ESOP.

(g) Subcontracting Bargaining Unit Work.

(h) Implementation of Policy denying the employees' work assignments until they provided information about their vehicle.

(i) Implementation of a Sunday Work Schedule and cessation of paying a bonus for Sunday Work.

(j) Implementation of a Policy requiring Employees to have a "lockdown" ladder rack on their vehicles.

(k) Implementation of a Policy deducting the Cost of Equipment from Employees" Paychecks without first giving the Employees the Opportunity to Account for Equipment.

11. Respondent violated Sections 8(a)(1) and (5) of the Act by consistently and repeatedly failing and refusing to timely provide the Union with information concerning mandatory subjects of bargaining in order for the Union to meet its collective bargaining obligation as the representative of the unit employees.

12. Respondent violated Sections 8(a)(1) and (5) of the Act by engaging in surface and bad faith bargaining and declaring an impasse when none existed and by failing to continue bargaining upon request by the Union.

13. The above unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent violated the Act, it shall be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act including the posting of an appropriate notice.

Respondent shall be ordered to make a valid offer of reinstatement to discriminatees Alisha Romans and Kevin Rhodes and/or an offer of instatement to Kevin Rhodes and make them whole for all loss of pay and benefits they may have suffered as a result of the unlawful

actions taken by Respondent against them with interest; make a valid offer of reinstatement to discriminates Tony Dutton, James Girton, Brian Hahn, Dave Higdon, Mike Meddings, Choozak Vargus and all other similarly situated discriminatees and make them whole for any loss of pay or benefits that they may have suffered, with appropriate interest; return to the status quo ante regarding its policies concerning compensation for those employees employed less than 90 days, compensation for service calls, the requirement of a doctor's note for absences, tech day frequency, Labor Day work, the ESOP, subcontracting bargaining or transferring unit work previously performed by unit employees, denial of work assignments until employees provided information about their vehicles, mandatory Sunday work, bonus pay for performing work on Sundays, the requirement that employees have a "lock down" ladder on their vehicles, deducting the cost of the equipment from employees' paychecks without first giving employees the opportunity to account for equipment.

Respondent shall also make whole all employees who have lost pay or benefits or suffered other economic loss with appropriate interest, as a result of the unlawful unilateral changes; bargain collectively and in good faith with the Union as the exclusive representative of its bargaining unit employees; provide the Union with all unlawfully withheld requested information; withdraw its Last Best and Final offer and, specifically withdraw Article 1, requiring the Union to have 75 percent of the bargaining unit members to maintain recognition, Article 17 permitting the Respondent to assign any bargaining unit work to people outside the unit without restriction, Article 19 giving the Respondent complete discretion over bargaining unit members' wages, and Article 38 terminating the agreement at midnight on March 14, 2005.

It is also recommended that the certification year be extended, that Respondent be ordered to: (1) bargain on request within 14 days of the Board's Order; (2) bargain on request for a minimum of 15 hours per week until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining; (3) prepare written bargaining progress reports every 15 days and submit them to the Regional Director and also serve the reports on the Union to provide the Union with an opportunity to reply.

It is further recommended that Respondent be ordered to make whole any employees who have suffered the loss of wages, monies and/or benefits because of the unfair labor practices as prescribed in *Ogle Protection* Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971) with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[2]

ORDER

2 If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The Respondent, JBM Inc., D/B/A Bluegrass Satellite, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Informing unit employees that their support of the Union is futile because Respondent would never agree to a contract with the Union, that there would be no health and life insurance because of the Union and that Respondent would not offer the Union on behalf of the employees anything matching or better than the employees already had.

(b) Telling the employees that they could not talk about the Union on Company property or time.

(c) Telling employees that Respondent would subcontract bargaining unit work in order to reduce the size of the bargaining unit and get rid of the Union.

(d) Soliciting employees to denigrate the Union and encourage them to decertify the Union.

(e) Telling employees that Respondent was subcontracting work to cause bargaining unit employees to quit.

(f) Soliciting employees to sign a prepared document to decertify the Union.

(g) Soliciting employees to obtain signed statements from other employees repudiating the Union and initiating the filing of petitions to decertify the Union.

(h) Interrogating employees about their union sympathies.

(i) Directing employees not to wear a Union button.

(j) Soliciting and assisting employees to file a decertification petition.

(k) Informing employees that selecting the Union was futile by stating that Respondent was not going to agree to any contract with the Union.

(l) Informing employees that selection of the Union was futile because Respondent would make proposals that the Union would never accept and would propose less desirable items of employment than those in existence at Respondent's other facilities.

(m) Issuing threats of discharge to employees because of their engagement in protected concerted activities.

(n) Maintaining a rule prohibiting its employees from discussing their wages with co-workers under threat of discharge.

(o) Imposing on their employees more onerous terms and conditions of employment and thereby causing their termination because of their engagement in protected concerted Union activities and because of their furnishing testimony in a National Labor Relations Board legal proceeding.

(p) Discharging and/or refusing to hire employees because of their engagement in protected concerted activities in support of the Union and/or because of their participation in Board process.

(q) Subcontracting bargaining unit work previously performed by unit employees, contrary to past practice, thereby reducing work opportunities for the unit employees causing them to lose employment through the reduced hours of work and by involuntary quitting, lay off or discharge.

(r) Making unilateral changes in the unit employees' terms and conditions of employment without affording the Union with notice and the opportunity to bargain concerning these changes.

(s) Failing and refusing to timely provide the Union with information concerning mandatory subjects of bargaining as the collective bargaining representative of the unit employees.

(t) Engaging in surface and bad faith bargaining and declaring an impasse where none existed and failing to continue bargaining upon request by the Union.

(u) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions to effectuate the policies of the Act:

(a) Bargain with the Union as set out in the proposed remedy as the exclusive collective bargaining representative of the employees in the following appropriate unit:

> All satellite technicians, including head area technician and clerk employed by Respondent at its Columbus, Ohio facility; but excluding all professional employees, guards and supervisors as defined in the Act.

(b) Upon request by the Union rescind any unilateral changes found unlawful in this decision and restore the status quo ante.

(c) Make whole all the unit employees for any loss of monies, wages or benefits they may have incurred as a result of the unlawful unilateral changes as found in this decision, with interest.

(d) Within 14 days from the date of this Order rescind the unlawful discharges of Alisha Romans and Kevin Rhodes and/or the failure and refusal to hire Kevin

Rhodes, and offer them full reinstatement to their former jobs or if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(e) Within 14 days from the date of this Order rescind the unlawful discharges, layoffs or involuntary quits sustained by Tony Dutton, Jamie Girton, Brian Hahn, Dave Higdon, Mike Meddings and Choozak Vargus and other similarly situated employees who lost employment through the reduced hours of work as a result of the unlawful actions of Respondent and offer them full reinstatement to their former jobs or if those jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make whole Alisha Romans, Kevin Rhodes and employees Dutton, Girton, Hahn, Higdon, Meddings and Vargus and any similarly situated employees for any loss of earnings and benefits suffered as a result of the discrimination against them, with interest.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations and/or refusal to hire in the case of Kevin Rhodes and advise all of the affected employees and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"[3] at its facility in Columbus, Ohio. Copies of the notice on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2004.

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the complaint be dismissed insofar as it alleges violations not found.

Dated at Washington, D.C., February 3, 2006.

_____

Lawrence W. Cullen
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees that supporting the United Electrical Radio and Machine Workers, America UE ("the Union") is futile as we would never sign a contract with the aforesaid union as the exclusive collective bargaining representative of the employees in the following appropriate unit:

All satellite technicians, including head area technician and clerk employed by Respondent at its Columbus, Ohio facility; but excluding all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT threaten our employees that there will be no health and life insurance because of the Union or that we will not offer the Union anything matching or better than our employees already have.

WE WILL NOT tell our employees that they cannot discuss the Union on Company time or on Company property.

WE WILL NOT tell our employees that we will subcontract bargaining unit work in order to reduce the size of the bargaining unit and get rid of the Union.

WE WILL NOT solicit our employees to sign a prepared document to decertify the Union.

WE WILL NOT solicit employees to obtain signed statements from other employees repudiating the Union and initiating the filing of decertification petitions.

WE WILL NOT interrogate our employees concerning their union sympathies.

WE WILL NOT inform our employees that their selection of the Union is futile by stating we will not agree to any contract with the Union.

WE WILL NOT inform our employees that selecting the Union is futile by telling them that we will make proposals that the Union would never accept and that we would propose less desirable terms of employment than are currently in existence at our facility.

WE WILL NOT threaten our employees with discharge because of their engagement in protected concerted activity.

WE WILL NOT maintain a rule in our policy manual prohibiting our employees from discussing their wages with co-workers under threat of discharge.

WE WILL NOT impose more onerous terms and conditions of employment on our employees or constructively discharge them or otherwise discharge them and /or refuse to hire them because of their engagement in protected concerted activities on behalf of the Union or because of their participation in the National Labor Relations Board's legal proceedings or process.

WE WILL NOT contrary to past practice, subcontract bargaining unit work previously performed by unit employees thereby reducing work opportunities for the unit employees causing them to lose employment through the reduced hours of work, by discharge, layoff or involuntary quit.

WE WILL NOT make unilateral changes in the following mandatory subjects of bargaining as follows:

(a) Our policy regarding Compensation for employees employed less than 90 days.
(b) Our policy regarding the amount of Compensation for Service Calls.
(c) Our Attendance Policy regarding the requirement of a Physician's Statement for Absences.
(d) Our policy by reducing "Tech Days" from 2 to 1 per week.
(e) Our policy by requiring employees to work either Labor Day or the day before.
(f) The implementation of ESOP
(g) Subcontracting bargaining unit work or reassignment of bargaining unit work.
(h) Implementation of a Policy denying our employees work assignments until they provide information about their vehicles.
(i) Implementation of a Sunday work schedule and cessation of paying a bonus for Sunday work.
(j) Implementation of a policy requiring employees to have a "Lockdown" ladder rack on their vehicles.
(k) Implementation of a policy of deducting the Cost of Equipment from Employees' paychecks without first giving the employees the opportunity to account for equipment.

WE WILL NOT fail and refuse to timely furnish the Union with information concerning mandatory subjects of bargaining necessary for the Union to perform its obligations as collective bargaining representative of the unit employees.

WE WILL NOT engage in surface and bad faith bargaining and will not declare an impasse where none exists and will not refuse to continue bargaining as requested by the Union.

WE WILL NOT in any other manner, interfere with, restrain or coerce our employees in the exercise of the rights listed above.

WE WILL within 14 days from the date of the Board's Order, rescind the unlawful discharges of Alisha Romans and Kevin Rhodes and/or the refusal to hire Kevin Rhodes and will rescind the discharges, lay offs or involuntary quits of Tony Dutton, Jamie Girton, Brian Hahn, Dave Higdon, Mike Meddings and Choozak Vargus and any other employees similarly situated and will offer them full reinstatement to their former jobs, or if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all of the aforesaid employees and all similarly situated employees for any loss of monies, earnings and other benefits they may have suffered as a result of the discrimination against them and the unlawful unilateral changes and violations of Sections 8(a)(1), (3), (4) and (5) of the Act, sustained as a result of the discrimination against them and the unlawful unilateral changes in the manner set forth in the remedy section of this decision, with interest.

WE WILL expunge from our files any reference to the unlawful warnings and discharges and notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any manner.

WE WILL on request by the Union bargain with the Union within 14 days of the Board's order for a minimum of 15 hours per week until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining.

JBM, INC. D/B/A BLUEGRASS SATELLITE
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: **www.nlrb.gov.**

550 Main Street - Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3663